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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

No. 552.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor; FRANK A. THOMPSON, Trustee, St. Louis-San Francisco Railway Company, Debtor; and BERRYMAN HENWOOD, Trustee, St. Louis Southwestern Railway Company, Debtor,
Petitioners,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation; THE NEW YORK CENTRAL RAILROAD COMPANY, a Corporation; and THE PENNSYLVANIA RAILROAD COMPANY, a Corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

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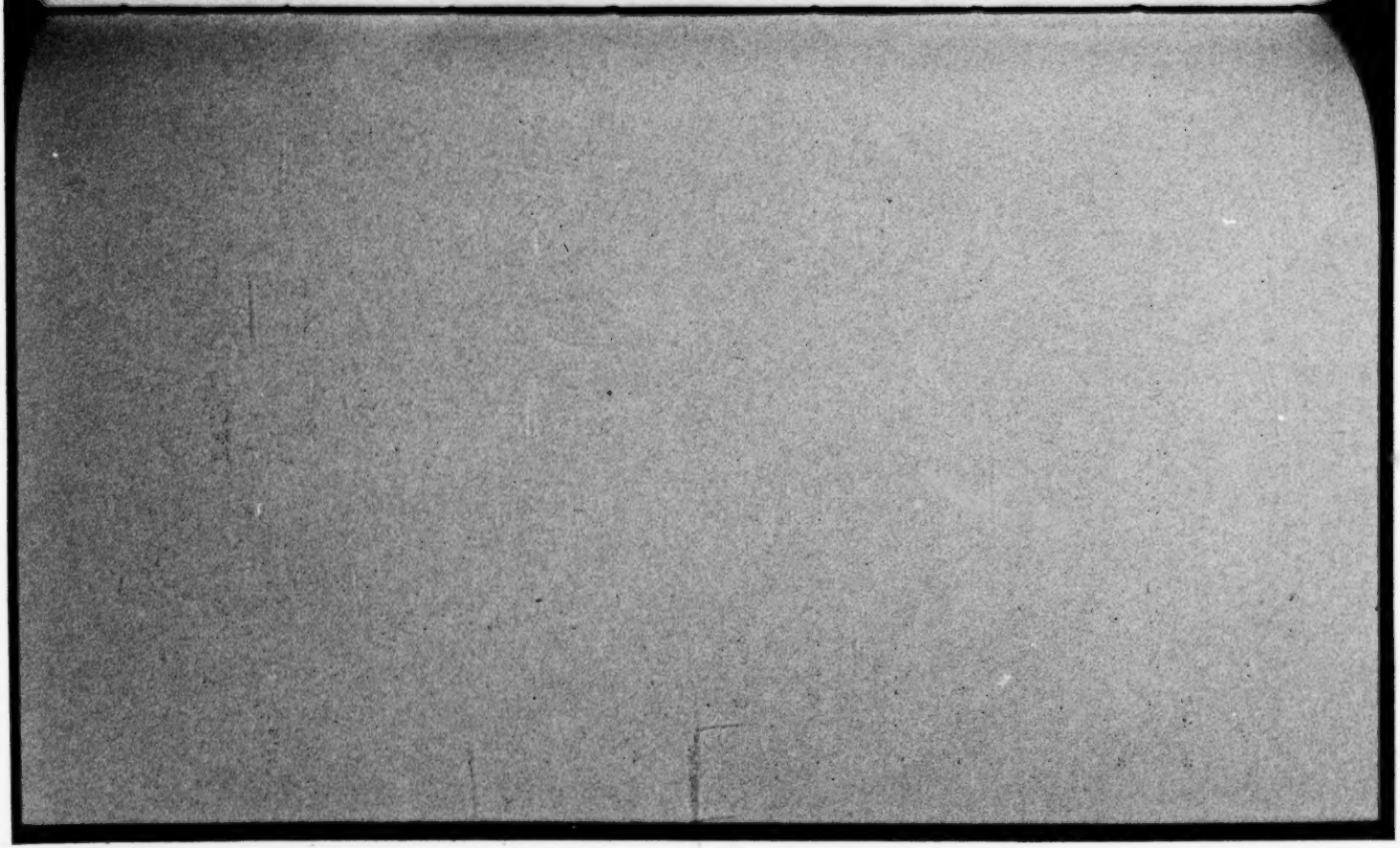

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PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

Petitioners above named pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Eighth Circuit, entered in the above cause[1] on June 10, 1946, affirming in part and reversing in part a decision of the District Court of the United States for the Eastern District of Missouri, Eastern Division.

1 Docketed below as Case No. 13129—Civil, in which petitioners and respondents herein were appellants and appellees, respectively.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals (R. 1788-1798) is reported in 155 F. (2) 767. The opinion of the District Court (R. 1659-1731) is reported in 59 F. Supp. 21.

JURISDICTION.

The judgment of the court below was entered June 10, 1946 (R. 1799-1800). Timely petitions for rehearing, filed by petitioners and respondents respectively, were considered and denied by order entered July 26, 1946 (R. 1867). The jurisdiction of this Court is invoked under § 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C., § 347).

QUESTIONS PRESENTED.

1. Whether rates, equalizing net land grant rates, offered the government by freight land grant equalization agreements, are "land grant rates" or reduced rates tendered pursuant to § 22 of the Interstate Commerce Act.

2. Whether such equalizing rates, when expressed as a single factor charge for joint transportation over two railroads, are joint rates as a matter of law or are denied that status by reason of not being filed with the Interstate Commerce Commission and published in tariff form.

3. Whether the Interstate Commerce Commission is without jurisdiction or power over such equalizing rates.

4. Whether the division sheet in issue, establishing percentages for dividing all-rail joint class and commodity rates, applies to such equalizing rates.

5. Whether the manner of dividing all other joint rates subject to the division sheet, namely, by applying the agreed percentages to the joint revenue actually received,

likewise governs division of revenue from joint rates made applicable by freight land grant equalization agreements.

STATUTES INVOLVED.

The Federal statutes involved are § 22 of the Interstate Commerce Act (49 U. S. C., § 22); the land grant statutes (10 U. S. C., § 1375, 49 U. S. C., § 65, and Pub. L. 256—79th Cong., Ch. 573—1st Sess., H. R. 694); and § 274-d of the Judicial Code governing declaratory judgments (28 U. S. C., § 400).

STATEMENT.

This action was brought by petitioners for a declaratory judgment under § 400 of the Judicial Code (28 U. S. C., § 400) and for an injunction (R. 14-15). Respondents, denying petitioners' claims, also prayed for a declaratory judgment and for an injunction (R. 39). The District Court denied petitioners' claims and granted respondents the relief they sought (R. 1730-1731). The Circuit Court of Appeals affirmed the denial of relief to petitioners but reversed the declaratory and injunctive relief granted respondents (R. 1799). Respondents have filed a petition for certiorari[2] seeking review by this Court of the judgment below insofar as it reverses the relief granted them by the District Court. Petitioners hereby seek review of the decision below insofar as it affirms the judgment of the District Court denying them the relief they sought.

Petitioners are trustees of separately owned and operated railroads in Southwestern Freight Bureau Territory.[3] Respondents own and operate railroads in Central Freight Association Territory and Trunk Line Territory,

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2 Docketed as Case No. 463 in this Court, October Term, 1946.

3 That territory, for the most part, lies west of the Mississippi River, and includes parts of New Mexico, Louisiana and Missouri and all of Arkansas, Oklahoma and Texas (R. 5, 32).

which with New England Territory is known as Official Classification Territory.[4] The lines of these railroads connect at gateway cities, such as St. Louis, Missouri, and Cairo, Illinois (R. 75).

The issue in litigation concerns the manner of applying percentages agreed upon in a joint division sheet to joint revenues derived from transporting military and naval property of the United States from points in one territory to points in the other[5] (R. 217, 218, 431, 432, 510, 545, 848, 1655-1656). Both eastbound and westbound movements are included (R. 1790). The shipments involved do not move over governing land grant routes (R. 1791). The rates that apply are single factor rates for transportation over two railroads (R. 175, 195, 327, 1791), made available to the government by freight land grant equalization agreements individually filed by the carriers with the War Department (Ex. D-2, R. 1251-1253). These agreements were offered to the government pursuant to § 22 of the Interstate Commerce Act (49 U. S. C., § 22). The reduced rates so offered equalize the net land grant rates available over governing land grant routes.[6] The joint revenue accruing from such rates is paid by the government to the delivering carrier, which is obligated to transmit to its connecting line the proportion of the joint revenue due the latter under lawful divisions in effect between them.

The percentages by which such joint revenue is divided

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4 That territory lies generally east of the Mississippi River and north of the Ohio River and of a line running in an easterly direction from Huntington, West Virginia, to Norfolk, Virginia (R. 5, 32).

5 The federal land grant laws (10 U. S. C., § 1375) prior to 1940 provided that for Government property carried over land grant mileage, the rate should be 50% of the applicable commercial rate. By the Transportation Act of 1940 (49 U. S. C., § 65) the land grant deductions were limited to military or naval property of the United States moving for military or naval, and not for civil use. All land grant deductions are terminated effective October 1, 1946 (Pub. L. 256—79th Cong., Ch. 573—1st Sess., H. R. 694).

6 That is, routes which if used would produce the lowest net charges to the government, by reason of land grant deductions from the commercial rate.

are established by Joint Division Sheet No. 200-A.[7] That division sheet, which became effective April 1, 1940, was formulated and issued by the Official and Southwestern lines, including petitioners and respondents, as a result of an order entered by the Interstate Commerce Commission on July 25, 1939.[8] The order directed the carriers to establish and apply certain prescribed divisions of joint all-rail interstate rates between Official and Southwestern territories. The order, however, while determining divisions generally between the territories, allowed the carriers to establish origin and destination groups, to base percentages on fair average distances, and to deviate in other respects from the order if they so agreed. Pursuant to that authorization, the division sheet deviated in some respects from, and included other matters not embraced within, the Commission's order (R. 221-223).

Since April 1, 1940, the effective date of the division sheet, the parties thereto have applied the percentages there agreed upon in dividing joint revenue derived from transportation of property for the public. In so doing, they have applied the agreed percentages to the actual revenue paid and received, with the result that the proportions so determined have reflected the transportation performed by each line. Likewise, the parties have applied these agreed percentages in dividing joint revenue from government traffic of a kind[9] not entitled to land

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[7] This division sheet was printed and distributed among its participating carriers. A copy appears as Exhibit 1 in the Record transmitted to this Court. Its scope and intention, and the rights, obligations, duties and liabilities it confers or imposes, are determinable from the provisions appearing on the first four pages of the document. These pages have been printed as a part of the Record herein (R. 75-81). The remaining pages list the parties to the instrument, the stations covered, and the percentages to be applied, and by stipulation below and in this Court have not been printed as a part of the Record. The original exhibit, comprising the entire document, has been transmitted to this Court as a part of the Record.

[8] Southwestern—Official Divisions Case, 234 I. C. C. 135.

[9] That is, not military or naval property moving for military or naval use.

grant deductions but which moved under reduced rates offered pursuant to § 22 of the Interstate Commerce Act. In so doing, the carriers likewise have applied the agreed percentages to the actual revenue. No controversy has arisen regarding either the applicability of, or the manner of applying, the agreed percentages to these joint revenues (R. 500, 501, 637). It is only as to division of revenue from equalizing rates[10] that a controversy exists. That controversy goes not to what percentages shall be applied, but only to how the agreed percentages shall be applied. Petitioners, in dividing such joint revenues when collected by them, apply the agreed percentages to the *actual* revenue paid and received for the transportation in fact performed. This is the same manner in which the agreed percentages are applied by all parties to the agreement to other joint revenues subject thereto. Respondents, on the contrary, in dividing such revenues when collected by them, apply the agreed percentages to a fictitious revenue, namely, the revenue that would have resulted had the transportation been performed at commercial rates (R. 509, 510). From the southwestern line's proportion of that theoretical revenue, respondents subtract a sum representing the statutory deductions available to the government on account of land grant mileage within Southwestern territory on the governing land-grant route. From the eastern line's proportion there is subtracted a sum representing deductions on account of land grant mileage in Official territory on the governing route (R. 175, 195, 327).

It will be noted that the real issue is not whether the division sheet supplies agreed percentages for the division of joint revenues from equalizing rates. Both the parties and the Courts below have so regarded it. The issue is

10 That is, rates, equalizing net land grant rates, made applicable to military and naval property of the United States, by freight land grant equalization agreements, when moving over a route other than the governing land grant route.

solely whether, under the terms of a division sheet which established no exceptional manner for applying the agreed percentages to this type of revenue, the respondents are free to apply those percentages in the arbitrary manner they have followed, or in any manner other than that governing all other divisions of joint revenue made pursuant to the division sheet.

Respondents base their manner of dividing this revenue on a provision inserted in their freight land grant equalization agreements, effective January 1, 1944 (R. 1730). By that provision, respondents, in agreeing with the government to apply the lowest net land grant rates on property transported jointly with other lines over non-land grant routes, inserted, in the form of a condition, a divisional formula by which respondents undertook to absorb only such land grant deductions as accrued by reason of land grant mileage in Central Freight Association Territory. The Circuit Court of Appeals has rightly held that respondents' freight land grant equalization agreements, to which petitioners are not parties, cannot lawfully be made the means of imposing, by unilateral action, that divisional formula upon petitioners (R. 1796-1798).

Respondents also sought to justify their departure from the division sheet in dividing joint revenue from equalizing rates by the claims that such rates were not joint rates, but were land grant or "net" rates; that the term "joint rates" in the division sheet embraced only published commercial rates filed with, and subject to the jurisdiction of, the Commission; and that the rates in issue were not subject to the jurisdiction of the Commission. Respondents further based their case on testimony that the parties did not intend to embrace equalization rates in formulating the division sheet, and on other parol evidence to the effect that these rates were not discussed in the conferences preceding and attending formulation and issuance of the division sheet (R. 572, 629, 657, 673, 864, 868, 870).

The District Court, upholding these contentions, held that the division sheet was not a contract for the division of joint revenue from equalizing rates. The Circuit Court of Appeals, in affirming that part of the judgment, "presumed" that the District Court disregarded all incompetent parol evidence, and held, without specifying it, that there was ample other evidence to support the findings on which the denial of relief to petitioners was based (R. 1795). The Opinion of the Circuit Court of Appeals, however, discloses that its affirmance of the District Court's judgment rested basically upon the misconceptions of law, hereinafter specified as error, by which it concluded that equalization rates are the same as land grant rates, are not joint rates, and are outside the jurisdiction of the Commission.

It is petitioners' position (1) that the rates here in issue are joint rates; (2) that the division sheet has established the percentages by which these joint rates, like all other joint rates, shall be divided by the parties thereto; (3) that application of the agreed percentages to the revenue actually received for the transportation in fact performed is the manner contemplated by the division sheet for applying the agreed percentages to the joint rates subject thereto; (4) that the division sheet contains no provision justifying respondents in applying the agreed percentages in any different manner to joint revenues derived from equalizing rates; (5) that the Courts below, in engrafting such an exception upon the contract, did so either through mistaken conceptions of the statutes and principles involved or through reliance upon incompetent parol evidence regarding the meaning of this integrated agreement; and (6) that as a matter of law, upon the evidence of record, petitioners are entitled to a judgment requiring division of these joint rates upon the basis, and in the manner, that govern all other joint rates subject to the division sheet.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that the term "joint rates" embraces only commercial rates charged the public and excludes reduced rates offered the government, by equalization agreements tendered pursuant to § 22 of the Interstate Commerce Act, for the purpose of equalizing net land grant rates.

2. In holding that such equalizing rates are not subject to the jurisdiction of the Interstate Commerce Commission.

3. In holding that the evidence sustained the District Court's findings that respondents' representatives were unauthorized to contract for division of revenues derived from rates equalizing net land grant rates, did not intend to enter such a contract, and never construed or interpreted the division sheet as being such a contract.

4. In presuming that the District Court disregarded incompetent parol evidence relied upon to vary the unambiguous meaning of the agreement integrated in the division sheet.

5. In holding that the division sheet is not a contract between the parties controlling the division of revenues derived from joint transportation of government property over equalizing routes.

6. In holding that the division sheet, while establishing the percentages for dividing joint revenue derived from transportation of government property over equalizing routes, left respondents free to apply those percentages to a theoretical revenue computed from commercial rates, rather than to the revenue paid and received for the transportation actually performed.

7. In affirming the judgment of the District Court insofar as it denied the relief prayed for by petitioners.

REASONS FOR GRANTING THE WRIT.

1. During recent years, a large portion of railroad traffic has consisted of government property carried over routes other than the governing land grant routes at rates, equalizing net land grant rates, made applicable by freight land grant equalization agreements tendered pursuant to § 22 of the Interstate Commerce Act. The aggregate joint revenues derived from this volume of traffic have been substantial. The lawful division of these joint revenues is a matter of important concern not only to petitioners but to the railroads of the country generally. Whether or not a joint division sheet, which by unambiguous terms establishes percentages for the division of all-rail joint class and commodity rates, embraces equalizing rates expressed as a single factor charge for joint transportation over two railroads is a Federal question of substance which has not been, but should be, decided by this Court.

2. The division sheet unequivocally applies to all-rail joint class and commodity rates (R. 81, 631, 632). While it contains certain exceptions (R. 81, 631, 632), these do not exclude either equalizing rates or any other rates made applicable pursuant to § 22 of the Interstate Commerce Act. In the Opinion of the District Court (R. 1683-1690) and in the Opinion of the Circuit Court of Appeals (R. 1794), it is apparent that their exclusion of equalizing rates from the scope of the division sheet rested in large measure upon the holding that such rates, because tendered under § 22, without filing with the Commission or publication in tariff form, were not joint rates. If equalizing rates are precluded from being joint rates because they are not filed or published like commercial rates, then by the same reasoning no rates made applicable under authority of § 22, without filing and publication, can be joint rates. During the recent emergency, a large volume of government traffic, of a character not entitled to land grant

deductions, was transported by the railroads of this country at rates reduced below the commercial level pursuant to § 22 of the Interstate Commerce Act (R. 9, 36). This traffic was in addition to property carried at equalizing rates over non-land grant routes or at statutory land grant rates over governing land grant routes. In any future emergency, a large share of government traffic again would move under § 22 rates. The holding of the decisions below that the § 22 rates in issue, although expressed as a single factor rate for joint transportation over two railroads, are not joint rates because they are not filed and published in the manner of commercial rates, affects not only these petitioners, and other carriers party to this division sheet, but the railroads of the country generally, many of which now are, and in the future will be, parties to similar division sheets. Whether reduced rates, offered the government or others, without filing or publication under § 22, when expressed as a single factor charge for transportation over two or more railroads, are joint rates within the legal scope and meaning of that term, therefore presents a Federal question of substance which has not been, but should be, decided by this Court.

3. Petitioners at all times have sought, and now seek, only interpretation and enforcement of the division sheet, not of the Commission's order from which it resulted. But the Circuit Court of Appeals, as well as the District Court, denied relief to petitioners upon the theory that the division sheet, having been issued as a result of the Commission's order, did not embrace equalization rates because "the Commission had no jurisdiction over land grant rates and was without power to make any order concerning them" (R. 1795; 155 F. [2] 767, 771; R. 1685-1687; 59 F. Supp. 21, 36-37). This holding was premised upon two misconceptions of law, first, that the rates in issue were "land grant rates," and, second, that the promulgation of these rates under § 22, without filing or publica-

tion, put them beyond the reach of the Commission's jurisdiction.

The later premise squarely conflicts with the decision of this Court in *Nashville, C. & St. L. R. Co. v. Tennessee*, 262 U. S. 318, 67 L. ed. 999. There, this Court, in upholding the power of the Commission to increase a reduced rate tendered under § 22, held that the provisions of the latter section impose no limitations upon the Commission's power but merely limit the requirement of equality contained elsewhere in the Act.

The other premise that the rates here in issue are "land grant rates" misconceives both the land grant statutes and § 22 of the Interstate Commerce Act. Land grant rates are rates made applicable by statute for transportation of certain government property over land grant mileage. The application of such rates, when the shipment moves over land grant mileage, is compulsory. Equalizing rates apply to shipments that do *not* move over the governing land grant route (R. 1792-1793). The statute does not compel or establish them. They are voluntarily reduced rates established under § 22 of the Interstate Commerce Act. The fact that they equal the land grant rates effective by statute over the land grant route does not make them land grant rates. Neither does it make them different from any other reduced rates tendered pursuant to § 22. The holding of the decisions below that such rates are "land grant rates" and are outside the jurisdiction of the Interstate Commerce Commission is one which not only places an improper construction upon the federal land grant statutes and upon § 22 of the Interstate Commerce Act, but departs from the principles established by this Court in the *Nashville* case, and thereby presents a Federal question of substance which has not been, but should be, specifically decided by this Court.

4. The point in controversy is not *what* percentages shall be applied to the joint revenue in issue, but only *how* the

agreed percentages shall be applied. All parties to the division sheet apply its agreed percentages in dividing joint revenue from these equalizing rates (R. 431-2, 510, 545, 849, 1655-6). Respondents themselves do so. The District Court required petitioners to do so (R. 1730-1731). The reason for this unanimity is that the division sheet is the very means, and the only instrument, by which the parties have agreed upon the percentages they apply in dividing these revenues. Yet despite this fundamental, undisputed fact, the decisions below hold that the agreement does "not embrace" such revenues (R. 1730, 1794).

If this holding means that the division sheet does not supply the percentages for dividing this joint revenue, the Court below has given to the contract an effect not expressed therein and never recognized by the parties who formulated it. If, on the other hand, the holding means that while the division sheet supplies the agreed percentages, respondents are free to apply them as to this revenue in a manner different from that followed as to all other revenue, then the Court below has interpolated into this written agreement an exception not placed there by the parties and contradictory of the language which integrated their agreement. Either holding so far departs from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

5. Throughout this litigation has run the misleading concept that petitioners seek to "pass on" to respondents a portion of the statutory deductions imposed by reason of land grants made to petitioners. The District Court states in its Opinion (R. 1665; 59 F. Supp. 21, 26): "Specifically, it is this transfer, from west to east, of land grant deductions that is the crux of this case." This conception, again, confuses land grant rates with equalizing rates. Equalizing rates contain no statutory deductions. The deductions are voluntary, and have reference not to land grant

mileage embraced in the route of movement but to land grant mileage on another route over which the shipment did not move. Petitioner St. Louis Southwestern Railway Company, for example, has no land grant mileage. It has never received any grant of land from the government and has never "been paid in advance" any portion of the charges incurred on government traffic. When it quotes a reduced rate, measured by land grant deductions available over the route of some other railroad, and later divides the joint revenue by applying the agreed percentages to the revenue actually received, it does not pass on to respondents any burden imposed by statute on it. It merely divides the revenue derived from the actual service performed in accordance with the percentages agreed upon for the route of movement. This supposed transfer of land grant deductions, which exerted a strong influence upon the decisions below, misconceives the nature of the rates imposed by the land grant statutes and the character of equalizing rates voluntarily established pursuant to § 22 of the Interstate Commerce Act, and thereby presents a Federal question of substance which has not been, but should be, decided by this Court.

6. Effective October 1, 1946, land grant deductions are terminated.[11] This circumstance may be regarded by the Court as diminishing, if not removing, the reasons why a review of the judgment below should be granted. In our brief opposing these respondents' petition for a writ in Case No. 463, we have pointed out that the termination of land grant deductions makes present freight land grant equalization agreements inoperative after October 1, 1946, except as to past movements, and removes all need or occasion for such agreements in the future. The repealing statute, however, does not have that effect upon division sheets. These will continue to be needed and used as instruments for the division of joint revenues. Nor does

[11] Pub. L. 256—79th Cong., Ch. 573—1st Sess., H. R. 694.

it lessen, we believe, the substance or importance of the holdings below by which single factor rates promulgated under § 22 of the Interstate Commerce Act for application to joint transportation are held not to be joint rates. Equalization rates are only one form of § 22 rates. The reasons assigned by the Courts below for holding them not joint rates apply equally to other rates promulgated under § 22. The repeal of land grant deductions will probably increase, rather than diminish, the degree to which government property will move under rates reduced under § 22. The principles and conceptions adopted and applied by the decisions below, if not reversed by this Court, will cause uncertainty and error as to whether rates established under § 22 for joint transportation are, or can be, joint rates; whether rates so established are within or outside the scope of division sheets dealing with joint rates; and whether the Interstate Commerce Commission has, or is without, jurisdiction over such rates and the division thereof. We, therefore, submit that the repeal of land grant deductions does not diminish the substance of the questions raised by this petition.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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September, 1946.